No. 16-1466

In the Supreme Court of the United States

MARK JANUS, PETITIONER

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether this Court should overrule *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and hold that the First Amendment prohibits government employers from compelling government employees to pay "agency fees" to the unions that represent them.

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INTEREST OF THE UNITED STATES

This case presents the question whether to overrule *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and hold that public employers may not compel their employees to pay agency fees to unions. As the nation's largest public employer, the United States has a substantial interest in the resolution of that question. The United States also administers federal statutes that address the legality of agency fees in the private sector. See 29 U.S.C. 158(a)(3), 164(b); 45 U.S.C. 152 (Eleventh). The United States has accordingly participated in many cases involving agency fees. See, *e.g.*, *Friedrichs* v. *California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam); *Harris* v. *Quinn*, 134 S. Ct. 2618 (2014); *Davenport* v. *Washington Educ. Ass'n*, 551 U.S. 177 (2007).

STATEMENT

1. a. The Illinois Public Labor Relations Act (PLRA) states that "[i]t is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection." 5 Ill. Comp. Stat. Ann. 315/2 (West 2013); see *Harris* v. *Quinn*, 134 S. Ct. 2618, 2625-2626 (2014) (discussing the PLRA). The PLRA accordingly provides that state employees may select a labor union to serve as their exclusive representative in bargaining with state employers over the terms and conditions of employment. 5 Ill. Comp. Stat. Ann. 315/6 (West 2013). The PLRA also imposes a duty on state employers to bargain with the unions selected as exclusive representatives. *Id.* at 315/4, 315/7 (West Supp. 2017).

Serving as an exclusive representative vests a union with significant power. The union's role "extinguishes the individual employee's power to order his own relations with his employer." *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). "[O]nly the union may contract the employee's terms and conditions of employment." *Ibid.* An employee "may disagree with many of the union decisions but is bound by them." *Ibid.* The union thus wields "powers comparable to those possessed by a legislative body." *Ibid.* (citation omitted).[1]

b. The PLRA provides state employees "the right to refrain from participating in any * * * concerted activities," including joining a labor union. 5 Ill. Comp. Stat.

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[1] The PLRA is patterned on the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, which expressly excludes public employers, 29 U.S.C. 152(2). See Pet. Br. 4 n.1.

Ann. 315/6(a) (West 2013). Public employees "may be required," however, to pay the union serving as their exclusive representative "a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." *Ibid.*; see also *id.* at 315/6(e). The fee may equal, but may not exceed, "the amount of dues uniformly required" of union members." *Id.* at 315/6(e).

Public employees may be required to pay such an "agency fee" even if they disagree with the union's positions and even if they do not want to be represented by the union. *Harris*, 134 S. Ct. at 2627. Agency fees are thus "state-coerced" payments. *Davenport* v. *Washington Educ. Ass'n*, 551 U.S. 177, 190 (2007). Indeed, under the PLRA, agency fees are "deducted by the [state] employer from the earnings of the nonmember employees and paid to the employee organization," without ever reaching the employee. 5 Ill. Comp. Stat. Ann. 315/6(e) (West 2013).

2. In *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), public-school teachers brought a First Amendment challenge to mandatory agency fees authorized by Michigan law. This Court acknowledged that "compel[ling] employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Id.* at 222. For example, an employee's "moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan." *Ibid.* The Court also recognized that "decisionmaking by a public employer is above all a political process," and that "because public employee unions attempt to influence governmental policymaking, their

activities—and the views of members who disagree with them—may be properly termed political." *Id.* at 228, 231.

Nevertheless, *Abood* resolved the challenge to public-sector agency fees based on two precedents involving agency fees charged by private railroads under the Railway Labor Act (RLA), 45 U.S.C. 152 (Eleventh). 431 U.S. at 222; see *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 235 (1956) (rejecting constitutional challenge to RLA provision authorizing compulsory agency fees for purposes "germane to collective bargaining"); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 768-769 (1961) (construing the RLA to prohibit the collection of agency fees for political purposes). *Abood* found these decisions "controlling," and accordingly drew the same line for the public sector that the Court had previously drawn for the private sector: agency fees could be used for "collective-bargaining, contract administration, and grievance-adjustment purposes," but not for "political purposes." 431 U.S. at 232, 234.

Justice Powell, joined by Chief Justice Burger and Justice Blackmun, disagreed with the majority's "novel premise that public employers are under no greater constitutional constraints than their counterparts in the private sector"—a "sweeping limitation of First Amendment rights" that they regarded as "unsupported by either precedent or reason." *Abood*, 431 U.S. at 245 (Powell, J., concurring in the judgment). In their view, "compelling a government employee to give financial support to a union in the public sector * * * impinges seriously upon interests in free speech and association protected by the First Amendment" and cannot

be justified "regardless of the uses to which the union puts the contribution." *Id.* at 255.

3. In recent years, this Court has thrice considered whether *Abood*'s reasoning and result are consistent with the First Amendment.

a. In *Knox* v. *Service Employees International Union*, 567 U.S. 298 (2012), the Court considered a First Amendment challenge to a public-sector union's one-time assessment of agency fees for "a broad range of political expenses, including television and radio advertising, direct mail, voter registration," and related activities in connection with state elections. *Id.* at 304 (citation omitted). The Court explained that "compulsory subsidies for private speech"—even for relatively "mundane commercial" speech like mushroom advertising—are generally "subject to exacting First Amendment scrutiny." *Id.* at 309-310 (citing *United States* v. *United Foods, Inc.*, 533 U.S. 405, 414 (2001)). The Court observed that *Abood*'s tolerance of compulsory union fees without applying such scrutiny "represents something of an anomaly." *Id.* at 311. But the Court found it unnecessary to "revisit" whether *Abood* and its progeny had "given adequate recognition to the critical First Amendment rights at stake," because "the new situation presented" by a one-time assessment of agency fees for political purpose was not covered by *Abood*. *Id.* at 311, 321. The Court thus held that the "general rule—individuals should not be compelled to subsidize private groups or private speech—should prevail," and invalidated the assessment of agency fees as a violation of the First Amendment. *Id.* at 321; see *id.* at 323 (Sotomayor, J., concurring in the judgment).

b. In *Harris*, Illinois home-health aides "deemed to be public employees solely for the purpose of unionization and the collection of an agency fee" asked this Court to revisit *Abood*. 134 S. Ct. at 2627. The Court again described *Abood* as an "anomaly" and explained that its "analysis is questionable on several grounds," including that it "seriously erred in treating" precedents involving private-sector agency fees "as having all but decided the constitutionality of compulsory payments to a public-sector union." *Id.* at 2627, 2632 (citation omitted). The Court, however, did not "reach [the] argument that *Abood* should be overruled," because the challengers were not "full-fledged public employees" and therefore were not subject to *Abood*. *Id.* at 2634, 2638 n.19. The Court instead applied the "exacting First Amendment scrutiny" that it had applied in *Knox*—a standard it cautioned was arguably "too permissive" given that speech on public-sector collective bargaining "does much more than" simply "propose a commercial transaction." *Id.* at 2639 (citation omitted). The Court determined, however, that "no fine parsing of levels of First Amendment scrutiny [was] needed," because the justification offered by Illinois and the union fell "far short of what the First Amendment demands," even under the more permissive standard. *Id.* at 2639, 2641.

c. This Court granted certiorari to reconsider *Abood* in *Friedrichs* v. *California Teachers Ass'n*, 135 S. Ct. 2933 (2015). The Court heard argument in January 2016, but subsequently affirmed the judgment by an equally divided Court. 136 S. Ct. 1083 (2016) (per curiam).

4. Petitioner is a public employee in the Illinois Department of Healthcare and Family Services. J.A. 68.

His bargaining unit is represented exclusively by respondent, a public-sector union. *Ibid.* The union and Illinois's Department of Central Management negotiated a collective bargaining agreement addressing a wide range of topics, including employee wages, hours, health care, pensions, tenure, working conditions, and strikes. *Id.* at 114-331. As authorized by the PLRA, 5 Ill. Comp. Stat. Ann. 315/6(e) (West 2013), the agreement includes a provision requiring agency fees to be automatically deducted from the paychecks of employees who decline to join the union. J.A. 122-124.

Petitioner "objects to many of the public-policy positions that [the union] advocates," including its positions "in collective bargaining." J.A. 87. In particular, petitioner believes the union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." *Ibid.* Petitioner also "does not agree with what he views as the union's one-sided politicking for only its point of view." *Ibid.*

In 2015, petitioner intervened in a First Amendment challenge to respondents' collection of compulsory agency fees. J.A. 60-102.[2] Respondents "moved to dismiss" because "the case is controlled by" *Abood*. Pet. App. 7a. The district court agreed that *Abood* is "binding" and dismissed the complaint. *Ibid.* The court of appeals affirmed. *Id.* at 5a.

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[2] The initial challenge was filed by the Governor of Illinois. Pet. App. 2a. The district court granted petitioner's motion to intervene at the same time it dismissed the Governor's complaint for lack of standing. *Id.* at 3a. The district court also allowed the Attorney General of Illinois to intervene in defense of the law. *Id.* at 4a.

SUMMARY OF ARGUMENT

This Court has explained twice in the past six years that *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), is an anomaly that rests on questionable foundations and defies generally applicable principles of First Amendment law. Now that the question is squarely presented, *Abood* should be overruled.

A. The First Amendment establishes a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris* v. *Quinn*, 134 S. Ct. 2618, 2644 (2014). That principle has added force when applied to the compelled subsidization of speech on public issues, which lies at the heart of the First Amendment's protection and triggers demanding scrutiny.

In the public sector, speech in collective bargaining is necessarily speech about public issues. Virtually every matter at stake in a public-sector labor agreement affects the public fisc, and therefore is a matter of public policy concerning all citizens. Moreover, issues like tenure for state employees, merit pay, and the size of the state workforce are about more than money: they concern no less than the proper structure and operation of government. To compel a public employee to subsidize his union's bargaining position on these questions is to force him to support private political and ideological viewpoints with which he may strongly disagree. As this Court held in *Harris* and *Knox* v. *Service Employees International Union*, 567 U.S. 298 (2012), such compulsion triggers exacting First Amendment scrutiny.

Abood, however, approved compulsory public-sector agency fees without applying any heightened scrutiny. Although *Abood* appeared to recognize the inherently

political nature of public-sector bargaining, it nevertheless viewed the constitutionality of public-sector agency fees as controlled by private-sector precedents, which did not involve the same First Amendment concerns. The decision also relied on an empirical assumption—that exclusive representation in the public sector requires mandatory agency fees—that this Court has since expressly rejected. And the decision failed to apply to collective bargaining the principles of free expression and free association that it properly held prohibit coerced financial support for political candidates. *Abood* thus ultimately endorsed precisely what it simultaneously prohibited: compelled subsidization of union speech for political or ideological causes.

When subjected to the scrutiny the First Amendment requires—either the "exacting" scrutiny that *Harris* found arguably "too permissive," 134 S. Ct. at 2639, or the traditional "strict scrutiny" that applies to speech on public issues, *Citizens United* v. *FEC*, 558 U.S. 310, 340 (2010)—compulsory agency fees in public employment cannot withstand review. Even assuming that the government has a compelling interest in ensuring functioning unions as partners in collective bargaining, the government can achieve that objective through means far less restrictive of First Amendment rights than compulsory agency fees. As the presence of public-sector unions in the federal government and right-to-work States illustrates, unions can fulfill their obligations without compelling objecting employees to subsidize collective-bargaining speech. Compulsory agency fees accordingly violate the First Amendment.

B. The United States previously defended *Abood* by relying primarily on the balancing test for public-employee speech claims established in *Pickering* v. *Board*

of Education, 391 U.S. 563 (1968). But *Pickering* balancing was not *Abood*'s stated rationale. And although *Pickering* applies to some government-workplace speech claims, it is an unnatural fit for petitioner's challenge. *Pickering* cases typically involve the discipline of a single employee for speech that disrupts the workplace, not a classwide challenge to a generally applicable statute that has little relation to a public employee's individual job duties. That is perhaps why this Court has not applied *Pickering* to claims involving the compelled subsidization of speech—claims that rarely if ever would implicate employee discipline or the workplace environment.

In any event, even if *Pickering* does apply, it does not support the result in *Abood*. Given that public-sector bargaining inherently involves public issues, compulsory agency fees in government employment necessarily involve public employees' speech as citizens on matters of public concern. Public employees' strong interest in freedom of speech on such matters outweighs the government's interest in authorizing public-sector unions to collect agency fees that they do not need to fulfill their responsibilities.

C. Although this Court reconsiders its precedents with caution, *stare decisis* does not warrant preserving *Abood*'s error. *Stare decisis* considerations are weakest in constitutional cases, and this Court has therefore been willing to overrule precedents that have been undermined by subsequent legal developments. Here, this Court has twice characterized *Abood* as an anomaly, and *Abood*'s incompatibility with the reasoning of *Harris* and *Knox* is a sufficient justification for its overruling. Nor would barring compulsory agency fees in public employment disturb significant reliance interests,

especially in the wake of *Harris* and *Knox*. To the contrary, overruling *Abood* would resolve a conflict between two contradictory lines of precedent and clarify First Amendment law.

ARGUMENT

THE COURT SHOULD OVERRULE *ABOOD* AND HOLD THAT THE FIRST AMENDMENT PROHIBITS COMPULSORY AGENCY FEES IN PUBLIC EMPLOYMENT

This Court held in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), that public employers may compel their employees to pay agency fees to unions to cover the costs of collective bargaining, contract administration, and grievance adjustment. This is the third time in the past five Terms that the Court has granted certiorari to consider overruling *Abood*. See *Friedrichs* v. *California Teachers Ass'n*, 135 S. Ct. 2933 (2015); *Harris* v. *Quinn*, 134 S. Ct. 48 (2013). In those other cases, the government contended that *Abood*'s result is correct and should be reaffirmed. See U.S. Amicus Br. at 11-33, *Friedrichs*, *supra*, No. 14-915 (Nov. 13, 2015); U.S. Amicus Br. at 14-28, *Harris*, *supra*, No. 11-681 (Dec. 13, 2013). Following the grant of certiorari in this case, the government reconsidered the question and reached the opposite conclusion. Largely for the reasons articulated by this Court in *Harris* and during the argument in *Friedrichs*, the government's previous briefs gave insufficient weight to the First Amendment interest of public employees in declining to fund speech on contested matters of public policy. *Abood*'s result is inconsistent with prevailing First Amendment precedent and should be overruled.

A. Compulsory Agency Fees In Public Employment Do Not Withstand First Amendment Scrutiny

1. Exacting scrutiny applies to the compelled subsidization of speech on issues of public policy

The First Amendment establishes a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris* v. *Quinn*, 134 S. Ct. 2618, 2644 (2014). Compelling a person to subsidize private speech that he opposes runs counter to the core textual promise of the First Amendment: "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-797 (1988). Accordingly, "[s]ome of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). The same principle forbids "compelling certain individuals to pay subsidies for speech to which they object," *United States* v. *United Foods, Inc.*, 533 U.S. 405, 410 (2001), because the "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech," *Harris*, 134 S. Ct. at 2639 (citation and internal quotation marks omitted).

In light of those protections, "compulsory subsidies for private speech are subject to exacting First Amendment scrutiny." *Knox* v. *Service Emps. Int'l Union*, 567 U.S. 298, 310 (2012). In *Knox*, this Court explained that such exacting scrutiny applies even to the compelled

subsidization of speech on commercial or non-ideological subjects not "likely to stir the passions of many." *Id.* at 309-310. To support such compelled subsidization of speech, *Knox* explained, the government must make at least two showings: "First, there must be a comprehensive regulatory scheme involving a 'mandated association' among those who are required to pay the subsidy"—a situation that is "exceedingly rare because * * * mandatory associations are permissible only when they serve a compelling state interest . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 310 (quoting *United Foods*, 533 U.S. at 414) (brackets, citation, and internal quotation marks omitted). "Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Ibid.* (quoting *United Foods*, 533 U.S. at 414). Thus, in *United Foods*, the Court struck down the compelled subsidization of generic mushroom advertising because "the challenged scheme violated the First Amendment" under this test. *Ibid.*; see *United Foods*, 533 U.S. at 414-415; cf. *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469-470 (1997) (upholding the compelled subsidization of speech for tree-fruit advertising as an ancillary part of a comprehensive scheme of market regulation).

Knox made clear that the "exacting" scrutiny it outlined was a minimum showing derived from the "less demanding standard used in prior cases to judge laws affecting commercial speech." 567 U.S. at 310 (citing *United Foods*, 533 U.S. at 414). By contrast, when the government compels the subsidization of private speech

with "powerful political and civic consequences," *Knox* suggested that even more rigorous First Amendment scrutiny may apply. *Ibid.*; see *id.* at 321-322 (citing *Citizens United* v. *FEC*, 558 U.S. 310 (2010)). Likewise, the Court observed in *Harris* that the standard outlined in *Knox* was arguably "too permissive" to evaluate speech that "does much more than" simply "propose a commercial transaction." 134 S. Ct. at 2639 (citation and internal quotation marks omitted).

As those decisions recognize, this Court has long maintained that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder* v. *Phelps*, 562 U.S. 443, 452 (2011) (citation omitted); see, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976) (per curiam); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964); *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Speech "concerning public affairs is more than self-expression; it is the essence of self-government." *Snyder*, 562 U.S. at 452 (citation omitted). Accordingly, laws that burden speech on public issues "are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 340 (citation and internal quotation marks omitted); see, *e.g.*, *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1665 (2015).

In keeping with that rigorous standard, this Court's few decisions upholding the compelled subsidization of speech have either stressed that the laws at issue "[did] *not* compel [objectors] to endorse or to finance any political or ideological views," *Wileman Bros.*, 521 U.S. at 469-470 (emphasis added); see *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 236-238 (1956), or instead

struck down as unconstitutional the portions of the laws that compelled subsidization of political or ideological speech, see *Keller* v. *State Bar*, 496 U.S. 1, 14 (1990); *Abood*, 431 U.S. at 235; cf. *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 788-791 (1961) (Black, J., dissenting). The Court has thus repeatedly recognized that the "First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals." *Knox*, 567 U.S. at 322.

2. Public-sector collective bargaining necessarily involves issues of public policy

Collective bargaining in the public sector necessarily implicates matters of public policy. When the government is on one side of the bargaining table, topics like wages, pensions, and healthcare "are important political issues," because the money to fund those benefits comes from the public fisc. *Harris*, 134 S. Ct. at 2632. Because "[p]ublic-employee salaries, pensions, and other benefits constitute a substantial percentage of the budgets of many" state and local governments, *Knox*, 567 U.S. at 520, decisions on "such issues will have a direct impact on the level of public services, priorities within state and municipal budgets, creation of bonded indebtedness, and tax rates," *Abood*, 431 U.S. at 258 (Powell, J., concurring in the judgment). It is thus axiomatic that bargaining with a governmental agency implicates many matters of public concern.

The structure of negotiations in the public sector also inherently implicates concerns of politics and public policy. In the private sector, unions negotiate with management representatives who are "guided by the profit motive and constrained by the normal operation of the market." *Abood*, 431 U.S. at 227. In the public

sector, by contrast, different incentives govern. The "parties have little concern with the product market, for the public employer is largely immune from competition." Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. Pa. J. Labor & Emp. L. 441, 442 (2003) (Summers). Indeed, the government has an incentive—often a strong one—to accommodate a public-sector union's requests, because public employees are also constituents and potential voters. See *Abood*, 431 U.S. at 228. Candidates for public office thus frequently seek and obtain the endorsements of public-sector unions. See, *e.g.*, AFSCME Council 31, *AFSCME Endorsements: 2016 General Election* (Sept. 1, 2016), http://www.afscme31.org/news/afscme-endorsements-2016-general-election (endorsing more than 100 candidates for general elections, from U.S. presidential election to county coroner elections).

Moreover, a collective bargaining agreement in the public sector must often be ratified by high-level government officials and funded by the legislature. See Summers 443. Under Illinois law, for example, "collective bargaining agreements are subject to the appropriation power of the State, a power which may only be exercised by the General Assembly." *State* v. *American Fed'n of State, Cnty., & Mun. Emps. Council 31*, 51 N.E.3d 738, 750 (Ill. 2016). A public-sector collective bargaining agreement is thus "not merely analogous to legislation, it has all of the attributes of legislation for the subjects with which it deals." *Abood*, 431 U.S. at 252-253 (Powell, J., concurring in the judgment). And a public-sector union's pursuit of such an agreement is not merely negotiation, but effectively "lobbying" the government to adopt the union's preferred positions on important questions of public policy. *Lehnert* v. *Ferris*

Faculty Ass'n, 500 U.S. 507, 520 (1991) (plurality opinion).

3. Compulsory agency fees in public employment therefore require exacting scrutiny

For all the reasons described above, a public-sector union's speech in collective bargaining necessarily has "powerful political and civic consequences." *Knox*, 567 U.S. at 310. Petitioner, for example, "objects to many of the public-policy positions that [the union] advocates * * * in collective bargaining." J.A. 87. Among other concerns, he believes the union's positions do not "appreciate the current fiscal crises in Illinois" and do not "reflect his best interests or the interests of Illinois citizens." *Ibid.* Likewise, for example, many public-school teachers strongly disagree with their union's position on teacher tenure, merit pay, classroom size, and other issues of broad public concern. See Tr. of Oral Arg. at 42-43, *Friedrichs*, *supra*, No. 14-915 (Jan. 11, 2016). Compelling an employee to fund speech on such important issues requires at least the "exacting First Amendment scrutiny" that this Court has applied to the compelled subsidization of commercial speech, if not the strict scrutiny that this Court traditionally applies to speech on issues of politics or public policy. *Knox*, 567 U.S. at 310; see *Harris*, 134 S. Ct. at 2639.

Abood partially recognized this principle, explaining that the First Amendment bars a State from requiring an objecting employee "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." 431 U.S. at 235. *Abood* also recognized "the important and often-noted differences in the nature of collective bargaining in the public and private sectors," and "the truism that because public employee unions attempt to influence

governmental policymaking, their activities—and the views of members who disagree with them—may be properly termed political." *Id.* at 227, 231.

Abood did not, however, connect those two premises and conclude that the First Amendment bars a State from compelling financial support for the policy-laden speech inherent in public-sector collective bargaining. Rather, *Abood* treated the Court's decisions on private-sector collective bargaining as "controlling." 431 U.S. at 232 (citing *Hanson* and *Street*, *supra*). Thus, "[i]nstead of drawing a line between the private and public sectors, the *Abood* Court drew a line between" expenditures related to collective bargaining and expenditures for "political or ideological purposes." *Harris*, 134 S. Ct. at 2632. But for reasons *Abood* itself explained, the line between collective bargaining and politics is illusory in the public sector; it is a "truism" that "public employee unions['] attempt to influence governmental policymaking * * * may be properly termed political." 431 U.S. at 231.

Abood thus "seriously erred" by importing private-sector principles into public-sector bargaining, and by overlooking the constitutional distinction "between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector." *Harris*, 134 S. Ct. at 2632; see *Abood*, 431 U.S. at 250 (Powell, J., concurring in the judgment) ("[T]he distinction is fundamental."); see also *Davenport* v. *Washington Educ. Ass'n*, 551 U.S. 177, 190 (2007) (noting that "public- and private-sector unions" present "somewhat different constitutional question[s]").

4. Compulsory agency fees in public employment do not withstand the appropriate level of scrutiny

Whether considered under the more permissive standard derived from commercial-speech doctrine or the strict scrutiny traditionally applicable to regulations of speech on public issues, compulsory public-sector agency fees cannot withstand First Amendment review.

a. In *Harris*, this Court invalidated compulsory public-sector agency fees under the standard for compelled subsidization of commercial or non-ideological speech—a standard the Court recognized may be "too permissive" because public-sector agency fees do "much more than" merely "propose a commercial transaction." 134 S. Ct. at 2639. The Court determined, however, that "no fine parsing of levels of First Amendment scrutiny [was] needed," because Illinois and the union could not "satisfy even the test used in *Knox*"—that is, they failed to show that the challenged agency fees serve a "compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Ibid.* (quoting *Knox*, 567 U.S. at 310). The Court recognized the State's interest in "labor peace," but explained that compelled agency fees bore little relation to that interest, because the employees objecting to the fees did not seek to "form a rival union," to "challenge the authority of the [union] to serve as the exclusive representative," or otherwise to undermine labor peace. *Id.* at 2640. All the employees sought was "the right not to be forced to contribute to the union." *Ibid.* A "union's status as exclusive bargaining agent and the right to collect an agency fee from non-members," the Court explained, "are not inextricably linked." *Ibid.* The showing made by Illinois and the

union thus fell "far short of what the First Amendment demands." *Id.* at 2641.

The same reasoning applies here. Petitioner does not contest the State's interest in labor peace or the union's role as the exclusive bargaining representative. As in *Harris*, however, Illinois and the union cannot meet their burden of showing that no "means significantly less restrictive of associational freedoms" than compulsory agency fees would achieve those interests. 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 310); see *id.* at 2639-2641 (noting that the State and the union must show that the challenged agency fees satisfy the required First Amendment scrutiny). In the federal government, for example, employees have a right to join or refrain from joining a union, and may select a union to serve as their exclusive bargaining representative in negotiating "conditions of employment." 5 U.S.C. 7102, 7111(a).[3] Federal-employee unions, however, may not charge agency fees to employees who choose not to join the union. 5 U.S.C. 7102; see *Harris*, 134 S. Ct. at 2640; S. Rep. No. 1272, 95th Cong., 2d Sess. at 159 (1978) (noting that Section 7102 is not "intended to authorize * * * the negotiations of an agency shop or union shop provision"). Despite the absence of agency fees, nearly a million federal employees—more than 27 percent of the federal workforce—are union members. Bureau of Labor Statistics, U.S. Dep't of Labor, *Union Members Summary* (Jan. 26, 2017), https://www.bls.gov/news.release/union2.nr0.htm (Tbl. 3); see *ibid.* (noting that 29.6 percent of state-government employees are union members). Public-employee unions likewise exist in States

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[3] Those "conditions" generally exclude wages and benefits, which are set by statute. 5 U.S.C. 7103(a)(14).

that do not allow compulsory agency fees. See, *e.g.*, *Ysursa* v. *Pocatello Educ. Ass'n*, 555 U.S. 353, 355-356 (2009). Thus, even applying the standard for compelled subsidization of commercial speech, here as in *Harris*, respondents' showing "falls far short of what the First Amendment demands." 134 S. Ct. at 2641.

b. *A fortiori*, compulsory agency fees in the public sector cannot satisfy the strict scrutiny traditionally required for speech on issues of public policy. Under that standard, respondents must demonstrate that compelling public employees to finance union speech in public-sector bargaining "furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 340 (citation omitted); see *Knox*, 567 U.S. at 321-322. For the reasons explained above, respondents cannot make that showing. Given the "important political issues" inextricably involved in public-sector collective bargaining, *Harris*, 134 S. Ct. at 2632—the functional equivalent of "lobbying" the government, *Lehnert*, 500 U.S. at 520 (plurality opinion)—there is no relevant constitutional difference between compelling financial support for particular public policy positions and compelling the payment of agency fees.

It is true that public employees compelled to pay agency fees remain free to speak out against their unions' positions in other ways—for example, by lobbying elected officials at public meetings or contributing to candidates who are less likely to accept the unions' demands. See *City of Madison Joint Sch. Dist. No. 8* v. *Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 175 (1976). But compelling financial support for speech on disputed issues of public policy cannot be justified on the ground that the speaker remains free to engage in counter-speech. The challengers to the compulsory

agency fees in *Harris* and *Knox* could voice their objections in other ways, and this Court nevertheless invalidated the compulsory agency fees. See *United Foods*, 533 U.S. at 411 (noting that the possibility of counter-speech was "not controlling of the outcome" of the First Amendment challenge); cf. *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 739 (2011) (invalidating law that burdened political expenditures by granting matching funds to opposing candidate).

Nor is the contention that compulsory agency fees are necessary to address the problem of "free riders" any more compelling here than in *Harris* or *Knox*. As the Court has explained, "free-rider arguments * * * are generally insufficient to overcome First Amendment objections." *Knox*, 567 U.S. at 311; see *Harris*, 134 S. Ct. at 2643. Although public-sector unions voluntarily assume the duty of representing all members in a bargaining unit—a decision that yields "a tremendous increase in the power of the * * * union," *American Commc'ns Assn., C.I.O* v. *Douds*, 339 U.S. 382, 401 (1950)—dissenting employees have no choice but to accept representation in collective bargaining, making them compelled riders for issues on which they may strongly disagree. The union's duty of representation accordingly does not support an entitlement to collect agency fees to protect against free riders, especially given that "unions have no constitutional entitlement to the fees of nonmember-employees" in the first place. *Davenport*, 551 U.S. at 185.

B. Compulsory Agency Fees In Public Employment Do Not Withstand *Pickering* Balancing

In recent cases involving public-sector agency fees, the United States defended *Abood*'s result under the

balancing test for public-employee speech claims established in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), or a similar standard of reasonableness review. See U.S. Amicus Br. at 11-33, *Friedrichs*, *supra* (No. 14-915); U.S. Amicus Br. at 14-28, *Harris*, *supra* (No. 11-681). As explained above, petitioner's claims are governed by "exacting First Amendment scrutiny," not *Pickering* balancing or some other lenient standard. *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 310). The *Pickering* test is an unnatural fit for petitioner's claims, because the concerns that underlie *Pickering*—ensuring order and discipline in the government workplace—are not implicated by the compelled subsidization of private speech that takes place well outside a government employee's workplace. But even if *Pickering* does apply, this Court should strike the balance in favor of petitioner's First Amendment rights.

1. **Pickering *balancing does not apply to petitioner's First Amendment challenge***

In *Pickering*, a public-school teacher brought a First Amendment challenge to his dismissal for criticizing school-funding policy in a public letter. 391 U.S. at 567. The Court held that resolving his claim required striking a "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

This Court has subsequently explained that *Pickering* provides the general "framework for analyzing whether the employee's interest or the government's interest should prevail in cases where the government seeks to curtail the speech of its employees." *Lane* v.

Franks, 134 S. Ct. 2369, 2377 (2014); see, *e.g.*, *Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006); *Connick* v. *Myers*, 461 U.S. 138, 140 (1983). But the central purposes of *Pickering* are "promoting efficiency and integrity in the discharge of official duties," and "maintaining proper discipline in public service." *Lane*, 134 S. Ct. at 2381 (brackets, citation, and internal quotation marks omitted). Such managerial control is necessary because "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418; accord *Connick*, 461 U.S. at 151 (grounding *Pickering* in the government's need for "control over the management of its personnel and internal affairs") (citation omitted).

Pickering's rationale does not translate to the present context. A requirement that employees pay their unions to engage in collective bargaining has little to do with the government's need to maintain an efficient workplace or assert managerial control over its employees. Likewise, petitioner's challenge to Illinois' authorization of public-sector agency fees—a "wholesale" regulation of "a broad category of expression by a massive number of potential speakers"—differs markedly from the "*post hoc* analysis of one employee's speech" at issue in the usual *Pickering* case. *United States* v. *National Treasury Emps. Union*, 513 U.S. 454, 466-467 (1995) (*NTEU*). Moreover, petitioner's challenge implicates not a *restriction* on speech, as *Pickering* cases generally do, but the *compelled subsidization* of speech.

For all these reasons, it is unsurprising that the Court has not applied *Pickering* to cases involving attempts by public employers to compel speech or the

subsidization of speech. Most significantly, the Court did not apply *Pickering* in *Abood*, *Knox*, or *Harris*. To the contrary, although *Pickering* predates *Abood*, the majority opinion in *Abood* cited *Pickering* only once—in a footnote describing "exceptions not pertinent here." 431 U.S. at 230 & n.27. Justice Powell likewise cited *Pickering* just once in his *Abood* opinion, followed immediately by the caveat that "[n]evertheless, even in public employment, 'a significant impairment of First Amendment rights must survive exacting scrutiny.'" *Id.* at 259 (quoting *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976) (plurality opinion)). *Knox* resolved a First Amendment challenge to public-sector agency fees without any citation to *Pickering*. And *Harris* explicitly rejected the government's invocation of *Pickering* balancing as "an effort to find a new justification for the decision in *Abood*, because neither in that case nor in any subsequent related case" has the Court "seen *Abood* as based on *Pickering* balancing." 134 S. Ct. at 2641.

This Court has likewise declined to apply *Pickering* in cases involving First Amendment challenges by public employees to mandatory membership in a political party, which involves an arguably analogous form of compelled expression. In *Rutan* v. *Republican Party*, 497 U.S. 62 (1990), for example, the Court struck down an Illinois practice of requiring party membership for certain state jobs because the "First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *Id.* at 76. The Court did not cite *Pickering*, relying instead on other political-patronage cases that similarly applied general First

Amendment scrutiny. See *id.* at 68-71 (citing *Elrod* v. *Burns*, *supra*, and *Branti* v. *Finkel*, 445 U.S. 507 (1980)). As in that context, *Pickering* balancing is an unnatural fit for reviewing petitioner's claim here.

2. Even if Pickering balancing applies, compulsory agency fees in public employment are unconstitutional

Even if *Pickering* balancing applies, compulsory agency fees in the public sector violate the First Amendment. See *Harris*, 134 S. Ct. at 2642. Under *Pickering*, "two inquiries * * * guide interpretation of the constitutional protections accorded to public employee speech." *Garcetti*, 547 U.S. at 418. "The first requires determining whether the employee spoke"—or, in this case, was compelled to subsidize speech—"as a citizen on a matter of public concern." *Ibid.* "If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Ibid.* The second step requires "balancing the employee's interest in such speech against the government's efficiency interest." *Lane*, 134 S. Ct. at 2378. Here, mandatory agency fees clearly compel public employees to subsidize speech on matters of public concern, and the State lacks any interest sufficient to overcome that serious burden on free speech rights.

a. The threshold inquiry under *Pickering* is "whether the employee spoke"—or was compelled to subsidize speech—"as a citizen on a matter of public concern." *Garcetti*, 547 U.S. at 418. As explained above, collective bargaining with a governmental employer necessarily involves speech on matters of public concern, because a public-sector union "takes many positions during collective bargaining that have powerful political and civic consequences," including on wages, pensions, and other

issues that affect the budget and the level of taxes and government services. *Knox*, 567 U.S. at 310. Indeed, this Court has explained that it is "impossible to argue that the level of * * * state spending for employee benefits * * * is not a matter of great public concern." *Harris*, 134 S. Ct. at 2642-2643.

Similarly, compelled financial support for a public-sector union's positions in collective bargaining necessarily implicates a public employee's speech "as a citizen," not merely as an employee. *Garcetti*, 547 U.S. at 418. This Court has consistently understood speech as an employee for purposes of the *Pickering* analysis to be speech made "pursuant to [an employee's] official duties." *Id.* at 421; see *Lane*, 134 S. Ct. at 2379 ("The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties."); see also *Harris*, 134 S. Ct. at 2642 ("Under [*Pickering*] cases, employee speech is unprotected if it is not on a matter of public concern (or is pursuant to an employee's job duties)."). The speech subsidized by agency fees—union negotiations with the government over wages, benefits, and similar issues of broad interest to citizens—is far removed from the scope of most public employees' individual job duties. Compulsory agency fees to subsidize a union's efforts in collective bargaining thus implicate a public employee's speech "as a citizen * * * upon matters of public concern." *Pickering*, 391 U.S. at 568.

b. At its second step, *Pickering* requires balancing "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Lane*, 134 S. Ct. at 2377 (citation omitted;

brackets in original). Petitioner's interest in "commenting upon"—or, as relevant here, not being forced to subsidize someone else's contrary commentary upon—public policy questions like the state budget and the level of government services is entitled to great weight. *Ibid.* "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick*, 461 U.S. at 145 (citation and quotation marks omitted). The First Amendment interests at stake are especially significant here, because compelled agency fees affect not just a single employee's speech, but "a broad category of expression by a massive number of potential speakers," which "gives rise to far more serious concerns than could any single supervisory decision." *NTEU*, 513 U.S. at 467-468. *Harris* accordingly concluded that compulsory agency fees "unquestionably impose a heavy burden on the First Amendment interests of objecting employees." 134 S. Ct. at 2643.

The broad "sweep" of the agency fees compelled "makes the Government's burden heavy" under the *Pickering* balancing test. *NTEU*, 513 U.S. at 467. Respondents must show that impinging on public employees' First Amendment rights by compelling them to fund speech that they oppose is outweighed by the government's interest in the "efficiency of the public services" that it "performs through its employees." *Lane*, 134 S. Ct. at 2377 (citation omitted). Compulsory agency fees to support the union's efforts in collective bargaining, however, have little to do with the concerns of workplace discipline and efficiency usually given weight in *Pickering* balancing. See *e.g.*, *NTEU*, 513 U.S. at 470 ("Because the vast majority of the speech at issue in this case does not involve the subject matter of

Government employment and takes place outside the workplace, the Government is unable to justify [the speech restriction] on the grounds of immediate workplace disruption asserted in *Pickering* and the cases that followed it."). And although the State has an interest in labor peace, that does not imply an equivalent interest in compulsory agency fees. As *Harris* explained—and as the presence of functioning unions in the federal government and right-to-work States underscores—compulsory agency fees are "not inextricably linked" to labor peace. 134 S. Ct. at 2640.

Moreover, compelling employees to subsidize speech on politics and public policy imposes a severe burden that even highly restrictive prohibitions on speech in the workplace do not. This Court has held, for example, that the government can prohibit certain partisan political speech by employees under the Hatch Act, 5 U.S.C. 7321 *et seq.* See *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973). But the government could not compel partisan political speech—or financial support for partisan political speech—by its employees. Cf. *Branti*, 445 U.S. at 515-516. Thus, "even if the permissibility of the agency-shop provision in the collective-bargaining agreement now at issue were analyzed under *Pickering*, that provision could not be upheld." *Harris*, 134 S. Ct. at 2643.

C. *Stare Decisis* Does Not Require Reaffirming *Abood*

Whether the question is analyzed under general First Amendment principles or *Pickering* balancing, *Abood*'s holding is incorrect. Although this Court exercises caution in reconsidering its precedents, *stare decisis* is "not an inexorable command." *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997) (citation omitted). In par-

ticular, the Court "has not hesitated to overrule decisions offensive to the First Amendment." *Citizens United*, 558 U.S. at 363 (citation omitted). Having thoroughly catalogued *Abood*'s errors, see *Harris*, 134 S. Ct. at 2632-2634; *Knox*, 567 U.S. at 310-311, the Court should now overrule it.

1. *Stare decisis* is "at its weakest" in constitutional cases, because errors in constitutional "interpretation can be altered only by constitutional amendment or by overruling" prior decisions. *Agostini*, 521 U.S. at 235; see *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014) (contrasting the "special force" of *stare decisis* in statutory cases) (citation omitted). Here, the Court has recognized that *Abood* "seriously erred" by importing decisions involving private-sector collective bargaining into the public sector. *Harris*, 134 S. Ct. at 2632. Moreover, "[i]n the years since *Abood*, as state and local expenditures on employee wages and benefits have mushroomed, the importance of the difference between bargaining in the public and private sectors has been driven home." *Ibid.* In light of these developments, *Abood*'s "rationale no longer withstands careful analysis." *Arizona* v. *Gant*, 556 U.S. 332, 348 (2009) (citation and internal quotation marks omitted).

2. Overruling precedent generally requires a "'special justification,' not just an argument that the precedent was wrongly decided." *Halliburton*, 134 S. Ct. at 2407 (quoting *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000)). One such justification is that "subsequent cases have undermined [the] doctrinal underpinnings" of the precedent in question. *Dickerson*, 530 U.S. at 443. That is precisely what *Harris* and *Knox*, among other decisions, have done to *Abood*. See *Harris*, 134

S. Ct. at 2632-2634, 2638 (describing *Abood*'s "questionable foundations," "unwarranted" assumption, and "serious[] err[or]"); *Knox*, 567 U.S. at 310-311, 314 (calling *Abood* "an anomaly" that may "cross * * * the limit of what the First Amendment can tolerate"); see also *Davenport*, 551 U.S. at 190 (noting the "somewhat different constitutional question" presented by "public- and private-sector unions"); *United Foods*, 533 U.S. at 410-414 (evaluating commercial speech under more exacting scrutiny than applied by *Abood*). Perhaps most telling, *Abood*'s advocates have sought primarily "to find a new justification for the decision." *Harris*, 134 S. Ct. at 2641. "When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished." *Citizens United*, 558 U.S. at 363.

Hudgens v. *NLRB*, 424 U.S. 507 (1976), another case at the intersection of labor law and the First Amendment, is instructive. There, the Court considered whether to overrule *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), which held that unionized employees had a First Amendment right to picket at a private shopping center. The Court observed that it had criticized *Logan Valley* in a subsequent decision, *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), but that *Lloyd* ultimately distinguished *Logan Valley* rather than overruling it. *Hudgens*, 424 U.S. at 517. When the question of overruling *Logan Valley* was squarely presented in *Hudgens*, however, the Court acknowledged that the reasoning in "*Lloyd* cannot be squared with" *Logan Valley*, and overruled *Logan Valley*. *Id* at 518.

Here, *Harris* and *Knox* play a role similar to *Lloyd*. Although the Court distinguished rather than overruled

Abood in *Harris* and *Knox*, the reasoning of those decisions fundamentally undercut *Abood*'s rationale. Unless one "analyzes the question presented as if [*Harris* and *Knox*] never happened," *Shelby County* v. *Holder*, 133 S. Ct. 2612, 2631 (2013), *Abood* "cannot be squared" with current First Amendment law, *Hudgens*, 424 U.S. at 518. That is a strong justification for overruling it. See *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002) (overruling precedent that was "irreconcilable" with reasoning of subsequent case); cf. U.S. Br. at 15-16, *Agostini*, *supra*, No. 96-552 (Feb. 28, 1997) (urging overruling of "an outlier in this area of constitutional law").

Moreover, *Abood* has not created significant reliance interests. See *Citizens United*, 558 U.S. at 362. Public-sector unions have long known that they "have no constitutional entitlement to the fees of nonmember-employees," *Davenport*, 551 U.S. at 185 (citing *Lincoln Fed. Labor Union No. 19129* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 529-531 (1949)), and they have been on notice that *Abood* is in serious jeopardy since *Harris* and *Knox*. Overruling *Abood* would not alter the substantive provisions of existing collective bargaining agreements on wages, hours, benefits, and other similar subjects; it would only remove one of the union's sources of funding, to the extent the union is unable to persuade non-members to pay dues. See J.A. 328 (severability clause). Although some collective bargaining agreements may have been negotiated on the assumption that *Abood* would remain the law, there is no indication that unions negotiated for the power to collect agency fees at the expense of better wages and benefits for their employees. Cf. *Harris*, 134 S. Ct. at 2641. And to the extent that agency-fee provisions *did* affect the substantive terms of the bargain, that only

underscores that agency fees are inextricably intertwined with speech on public-policy issues, and that *Abood* applied insufficient scrutiny to the widespread compelled subsidization of highly protected speech.

3. Finally, overruling *Abood* on the grounds outlined here would not undermine the validity of *private-sector* agency-fee arrangements authorized by the NLRA and the RLA, see 29 U.S.C. 158(a)(3), 164(b); 45 U.S.C. 152 (Eleventh), because collective bargaining in the private sector does not inherently implicate the public-policy issues that public-sector collective bargaining does. None of the opinions questioning *Abood*'s rationale has doubted the constitutionality of private-sector agency fees. To the contrary, *Harris* criticized *Abood* precisely for failing to draw "a line between the public and private sectors." 134 S. Ct. at 2632; see *ibid.* (noting that *Abood* "failed to appreciate the difference" between speech involuntarily subsidized in the public and private sectors). Justice Powell's opinion in *Abood* likewise relied on the "constitutional distinction between what the government can require of its own employees and what it can permit private employers to do"—a distinction he termed "fundamental." 431 U.S. at 250. Moreover, the NLRA's mere authorization of private-sector agency fees in States that do not outlaw such fees, 29 U.S.C. 164(b), may not constitute state action necessary to implicate the First Amendment. See *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 761 (1988) (reserving state-action question, but citing precedents that "do[] not involve state action"); see also U.S. Amicus Br. at 25-26, *Beck*, *supra*, No. 86-637 (Apr. 30, 1987) (arguing that NLRA does not give rise to state action in private-sector agency-fee context).

By authorizing state and local governments to compel public employees to finance speech on matters of central public concern with which they disagree, *Abood* conflicts with prevailing precedents and with "the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 134 S. Ct. at 2644. *Abood* should accordingly be overruled.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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